

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 26, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-151
Petitioner	:	A. C. No. 46-05868-03575
v.	:	
	:	Pinnacle Prep. Plant
UNITED STATES STEEL	:	
MINING CO., INC.,	:	
Respondent	:	Docket No. WEVA 97-40
	:	A. C. No. 46-01816-03952
	:	
	:	Gary No. 50 Mine

DECISION

Appearances: James F. Bowman, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Mount Hope, West Virginia, for the Petitioner;
Gary R. Kelly, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These consolidated proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). These consolidated matters were called for hearing on March 19, 1997, in the vicinity of Beckley, West Virginia. At the hearing the parties moved to settle the two citations in Docket No. WEVA 97-40 by reducing the total proposed civil penalties from \$270.00 to \$50.00. The settlement terms included vacating Citation No. 3337871 because the facts surrounding the cited condition did not support the alleged violation of the subject safeguard. The respondent agreed to pay the remaining \$50.00 civil penalty assessed for the non-significant and substantial (non-S&S) violation in Citation No. 7159220. At the hearing, I concluded the settlement terms were consistent with the criteria set forth in section 110(i) of the Act. Accordingly, the parties' motion to approve settlement of WEVA 97-40 was granted on the record, and the settlement terms are incorporated in this decision.

Docket No. WEVA 96-151 concerns a total \$100.00 proposed civil penalty for two

non-S&S 104(a) citations issued at the respondent's Pinnacle Preparation Plant on March 26, 1996, by Mine Safety and Health Administration (MSHA) Inspector Gerald L. Cook. The citations involve the mandatory safety provisions of section 77.400, 30 C.F.R. ' 77.400, that govern mechanical equipment guards. Citation No. 3581246 concerns the question of whether a large u-shaped expanded metal area guard installed in front of the respondent's SB-3 tail pulley was *securely in place* as required by section 77.400(d) because only four of its six metal plates, or *feet*, were bolted to the concrete floor.

Citation No. 3581248 concerns the issue of whether or not there was an adequate expanded metal guard on the respondent's 11-1 belt head pulley at the time of Cook's inspection. Section 77.400(c) requires that guards *extend a distance sufficient* to prevent persons from reaching behind the guard. Although Citation No. 3581248 refers to the *existing guard* installed on the 11-1 belt (emphasis added), at trial, the Secretary asserted there was no guard at the cited location other than pipes or the belt's metal framework that ran along the side of the head pulley.

The parties' post-hearing proposed findings of fact and conclusions of law, and reply briefs, have been considered in the disposition of these issues. In view of the non-S&S nature of the alleged guarding violations, the only issues for resolution are whether the violations in fact occurred. As discussed below, the Secretary has failed to satisfy her burden of proof. Consequently, Citation Nos. 3581246 and 3581248 shall be vacated.

Citation No. 3581246

MSHA Inspector Cook arrived at the Pinnacle Preparation Plant at approximately 10:00 p.m. on the evening of March 25, 1996. From 10:00 p.m. until midnight, Cook was accompanied by David Bailey, a Miner's Representative. Shortly after midnight, Cook was joined by Thurman Chapman, the respondent's Maintenance Foreman and Shift Manager. Chapman remained with Cook throughout the remainder of his inspection, which lasted until approximately 4:00 a.m. on March 26, 1996.

At approximately 1:00 a.m., Cook observed the SB-3 belt conveyor. Cook noted the SB-3 tail pulley was guarded by a large one piece, three-sided, u-shaped expanded metal guard. Cook testified that he was unable to estimate the dimensions or weight of the subject guard. (Tr. 79-80, 91). The respondent asserts the guard was approximately 60 inches in height and was 102 inches in length. (Ex. R-14). The u-shaped guard was located on a concrete surface resting on six metal plates or *feet*. Four of the six metal feet were secured by bolts or studs driven into the concrete. John O'Brien, the respondent's Safety Director, opined that the guard weighed between 150 and 180 pounds. (Tr. 273). The respondent's estimations of the dimensions and weight of the guard are consistent with the photographic evidence. (See Gov. Exs. 6-8). Regardless of the precise weight of the guard, Cook admitted that moving the guard required a certain degree of effort, analogous to moving a piece of furniture such as a credenza. (Tr. 114-15). Cook also conceded moving the guard required a concerted effort in that the footings were on metal plates rather than on wheels. (Tr. 115). Thus, moving the guard required

lifting it, or dragging the guard's feet on the concrete floor. (Tr. 115-16). Consequently, Cook acknowledged the guard could not be moved casually or accidentally by brushing against it. (*Id.*). Moreover, given the fact that four of the six feet were bolted to the floor, the guard could only be moved approximately two feet. (Tr. 116). However, two feet was an adequate distance to permit someone to move in behind the guard. (Tr. 116-17).

As a result of his observations, Cook issued Citation No. 3581246, alleging a violation of the mandatory safety standard in section 77.400(d). Citation No. 3581246 stated, "[t]he guard located for the S-3B belt conveyor tail pulley was not secured in place in that the guard on the creek side could be moved exposing the tail pulley." Section 77.400(d) provides, "[e]xcept when testing machinery, guards shall be securely in place while machinery is being operated (emphasis added)."

Thus, the operative phrase is the "securely in place" provision in section 77.400(d). Courts routinely defer to agency interpretations of their regulations so long as they are logically consistent with the language of the regulations and . . . serve a permissible regulatory function." *Morton International, Inc.*, 18 FMSHRC 533, 541 (April 1996) (Concurring Opinion) quoting *Rollins Envtl. Services, Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). Generally speaking, an object is securely in place if it is stable or not likely to fail or give way." *Webster's New World Dictionary* 1288 (Second College Edition 1980). The Commission has addressed the regulatory purpose of the Secretary's guarding provisions in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984). The Commission stated:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. FMSHRC at 2097.

While the Secretary is normally entitled to deference when interpreting her own mandatory safety standards, deference cannot be afforded to the Secretary's interpretation if it is plainly wrong and inconsistent with the intended purpose of the regulation. *See, e.g.*, 18 FMSHRC at 541. As noted by the Commission in *Thomas Brothers*, the logical purpose of section 77.400(d) is to prevent any reasonable possibility of contact and injury resulting from inadvertence or momentary carelessness. The purpose of guarding is not to lock-out potential victims of pinch points who are deliberately determined to remove guarding installations for the purpose of accessing moving equipment without de-energizing it.

Here, the term "securely in place" connotes installation of a guard in a manner that prevents the guard from being dislodged by vibrations inherent in the operation of equipment. In

this regard, the subject 150 to 180 pound six feet high metal guarding cage, bolted to the concrete floor in four places, was securely in place within the plain meaning of the regulatory standard. If the Secretary wishes the regulatory standard to require that guards be locked in place, similar to lock-out devices on circuit breakers, she should pursue such a regulatory course through the rulemaking process. Accordingly, the Secretary has failed to demonstrate the cited condition violated section 75.400(d). As a consequence, Citation No. 3581246 shall be vacated.

Citation No. 3581248

At approximately 1:45 a.m. Cook inspected the respondent's 11-1 belt head pulley. Although various wire mesh (expanded metal) screens were installed around the head pulley, Cook testified the wire mesh screen guard was missing on the down stream side of the head pulley in the early morning hours on March 26, 1996. Consequently, Cook issued Citation No. 3581248 alleging a violation of the mandatory standard in section 77.400(c). Specifically, the citation alleged *the existing guard installed on the 11-1 belt . . . did not extend [a] sufficient distance. . . (emphasis added).* Section 77.400(c) requires guards at conveyor pulleys to extend a distance sufficient to prevent a person from reaching in behind the guard and becoming caught between the belt and the pulley.

The respondent, through the testimony of its wage mechanic Estel Lane and shift manager Chapman, maintains that, at the time of the issuance of the citation, there was a three feet by three feet guard, constructed of angle iron and expandable metal, that extended approximately six inches above the conduit as depicted in Gov. Ex. 9. (Tr. 226-29, 322-29). Wage mechanic Raymond Walker testified he abated the citation on the morning of March 26, 1996, by removing a smaller guard consisting of angle iron and expanded metal and replacing it with a higher guard. (Tr. 311-18).

Although, at the hearing, Cook maintained there was a missing guard at the cited head pulley, Citation No. 3581248, consistent with the respondent's assertion that a guard was installed, reflects there was an existing guard installed at the down stream side of the 11-1 head belt pulley. (Tr. 130, 147, 151). Cook attempted to reconcile the discrepancy in his testimony concerning an alleged missing guard with his reference in Citation No. 3581248 to an inadequate guard, by explaining that he assumed the respondent was using the metal pipes or framework surrounding the head pulley as a substitute for guarding. (Tr. 151).

However, MSHA Supervisory Inspector Jules Gautier, Cook's supervisor, failed to shed light on Cook's testimony. Gautier testified that he participated in the abatement of Citation No. 3581248 on the afternoon of March 26, 1996. Gautier believed there were four guards surrounding the perimeter of the 11-1 head pulley at the time of Cook's inspection. Based on his observations during the abatement process, Gautier concluded three of the guards were the same size, and the fourth guard, which was the one cited by Cook, was smaller than the other three. The citation was abated by welding additional metal to the existing framework of the fourth guard. (Tr. 334, 339-49). Gautier characterized the piece of metal added for the purposes of

abatement as an extension to the existing structure. (Tr. 360). In apparent contradiction to Cook's testimony, Gautier testified that he did not consider it appropriate to refer to the belt rail, framework or pipes at the 11-1 head pulley depicted in Gov. Ex. 9 as a guard.

Section 104(a) of the Act, 30 U.S.C. ' 814(a), requires that each citation shall describe with particularity the nature of the violation. The description of the cited condition on the face of the citation dictates the parameters for determining whether the Secretary has established the fact of a violation. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (March 1993). Here, despite having cited an inadequate guard that did not extend far enough, the Secretary set out to establish a missing guard. In the final analysis the Secretary's case establishes neither. While I am certain Cook attempted to testify truthfully and to the best of his recollection, his testimony, given its uncertainty and the contradictory testimony by his supervisor, Gautier, is inadequate to overcome the testimony of respondent witnesses Chapman, Lane and Walker. Consequently, Citation No. 3581248 shall also be vacated.

Order

In view of the above, consistent with the parties settlement agreement in Docket No. WEVA 97-40, Citation No. 3337871 in **IS VACATED**, and, **IT IS ORDERED** that the respondent pay, within 30 days of the date of this decision, a \$50.00 civil penalty in satisfaction of Citation No. 7159220. Upon timely receipt of the \$50.00 payment, Docket No. WEVA 97-40 **IS DISMISSED**.

IT IS FURTHER ORDERED that Citation Nos. 3581246 and 3581248 **ARE VACATED** and Docket No. WEVA 96-151 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

James F. Bowman, Conference and Litigation Representative, U.S. Dept. of Labor, MSHA, 100
Bluestone Road, Mt. Hope, WV 25880-1000
(Certified Mail)

Pam Silverman, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 516,
Arlington, VA 22203 (Certified Mail)

Gary R. Kelly, Esq., U.S. Steel Mining Co., Inc., USX Tower, Room 1580, 600 Grant Street,
Pittsburgh, PA 15219-4776 (Certified Mail)

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